IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 261 OF 1999.

Gomantak Mazdoor Sangh,
a Trade Union, registered under the
Trade Unions Act, 1926, having its
Office at Kamakshi Niwas, Ponda, Goa,
represented through its General
Secretary, Shri P. Gaonkar. .... Petitioner.

Versus

1. Mormugao Port Trust,
having office at Mormugao
Harbour, Vasco-da-Gama,
Goa, represnted through the
Chairman of its Board of Trustees,
having his office at Mormugao Harbour,
Vasco-da-Gama, Goa.

2. Mormugao Handling Agents
Association, having office at
Pereira Chambers, Vasco-da-Gama,
Goa, represented through its
President.

3. Union of India,
represented through its Secreetary
for Labour, having office at
Central Secretariat, Newl Delhi.

4. Mormugao Stevedores Association,
having its office at Vasco-da-Gama,
Goa, represented through its
President. ..... Respondents.

Shri G. Sardessai, Advocate for the Petitioner.

Shri V.B. Nadkarni, Senior Advocate with Shri Y.V. Nadkarni,
Advocate for the Respondent No.1.

Shri S.G. Dessai, Senior Advocate with Shri D.B. Ambekar, Advocate
for the Respondent No.2.

Shri V.P. Thali, Senior Central Govt. Standing Counsel for the
Respondent No.3.

CORAM: B.H. MARLAPALLE &
N.A. BRITTO, JJ.

DATE: 20th SEPTEMBER, 2004.

ORAL JUDGMENT: (PER MARLAPALLE, J.)

This petition filed under Article 226 of the Constitution as amended from time to time seeks the following substantial reliefs:-

(a) To hold and declare that the workers employed by the Respondent No.2 in the "Mini-Pool" are registered Dock Workers as defined in the Mormugao Dock Workers (Regulation of Employment) Scheme 1965;

(b) To issue a declaratory writ to the effect tht the workers in the Mini Pool as specified in the Mormugao Dock Workers (Regularization of Employment) Scheme, 1965, to be the regular workers of respondent No.1 and entitled to all the benefits of regular workers under the respondent No.1;

In the alternative to issue an appropriate writ, order or direction commanding the respondent No.1 to absorb the said pool workers as and when the vacancies arise.

2. The petitioner claims to be a registered Trade Union under the Trade Unions Act 1926 and represents purportedly 350 out of 450 Mini Pool workers and it further claims to be concerned with the welfare, security of tenure and all other terms and conditions of the said workmen. Respondent No.1 is a major port as defined in the

Indian Ports Act, 1908 as well as the Major Port Trust Act 1963. The terms and conditions of employment of all dock workers in India were originally governed by the Dock Workers (Regulation of Employment) Act 1948 (the Act for short) and a Scheme by name of Dock Workers (Regulation of Emplyment) Scheme 1965 (the Scheme of 1965 for short) was framed by the Ministry of Labour and Employment, Government of India vide Notification dated 10th April, 1965 and in exercise of the powers conferred by Section 3 and Section 4(1) of the said Act the employment of labour in the dock premises was governed by the said Scheme. Section 5-B of the Act stipulates the functions of the Board and it shall be responsible for administering the Scheme for the Port or group of Ports for which it has been established and shall exercise such powers and perform such functions as may be conferred on it by the Scheme. Under the Scheme Mormugao Dock Labour Board (MDLB) was constituted under clause 7 and an administrative body under clause 5. The petitioner Union claims that the workmen it had represented from the Mini Pool were registered Dock workers within the meaning of clause 3(n) and in terms of clause 3(p) “Reserved Pool” means a pool of registered dock workers who are available for work and who are not for the time being in employment of registered employers or a group of dock employers as monthly workers. Reference has been made to the provisions of clauses 10, 18, 19, 28, 29, 32, 33, 35, 38, 39 and 41 of the Scheme in support of the claim that the said workers represented by the Union were working for respondent No.1 through the agency of respondent No.2,

an association of registered goods handling employers. However, originally respondent No.2 did not exist and the issue of introduction of listing scheme for decasualisation of dock workers engaged in handling operations on wares, sheds and godowns in the premises of respondent No.1 Mormugao Port Trust was under consideration of the MDLB. On 17th March, 1979 the Deputy Chairman of MDLB had called a meeting of the representatives of Handling Agents as well as the trade Unions. In the said meeting it was agreed that the Scheme drafted and circulated among the Handling Agents would invite views and accordingly a draft was prepared by MDLB which was forwarded to the Handling Agents by letter dated 8th January, 1983 signed by the Deputy Chairman of the said Board. Ameeting of the Handling Agents was also held and the Handling Agents namely M/s. Agencia Ultramarina Pvt. Ltd, M/s. Hiralal & Co. and M/s. Chowgule Brothers were present and were called upon to study the cost factory in the formation of a pool and of clearing and forwarding workers under a Clearing and Forwarding Agents Association and to submit its report by end of February, 1983. Several meetings were held in 1983 and 1984 and after deliberations the MDLB and the Handling Agents decided to form as Association of Handling Agents consisting of M/s. Agencia Commercial Maritima, M/s. Agencia Ultramarina Pvt. Ltd., M/s Chowgule Brothers, M/s. Elisbao Pereira & Sons, M/s. Hirala & Co., M/s Machado & Sons Agents & Stevedores Pvt. Ltd. And M.s V.S. Dempo & Co. Pvt. Ltd. Accordingly an Association under the name and style of Mormugao Handling Agents Association (Respondent

No.2) was formed and registered under the Societies Registration Act, 1860 and all these workers were being employed in the premises of respondent No.1 through the said Association, though they continued to be the workers of the respective Agents. The Union was requested to go through the details of records of the respondent No.1 relating to casual handling workers for the purpose of maintaining their pools for deciding their seniority and work out a procedure to regulate their employment and conditions of service etc. A medical board consisting of a medical officers of MDLB and Mormugao Port Trust Hospital was constituted to determine the fitness of handling workers. And finally a pool of workers who were found fit was constituted . This pool is called as “Mini Pool” and the workers were registered with respondent No.2 on its formation.

3. However, the Government of India enacted another Act namely the Dock Workers (Regulation of Employment) (Inapplicability to Major Ports) Act, 1997 (for short the Act of 1997) and the Dock Workers (Regulation of Employment) Act, 1948 ceased to operate in relation to respondent No.1 from the appointed day i.e. 31st March, 1998. It is the contention of the petitioner Union that in terms of the provisions of Sections 3 and 4 of the Act of 1997 all the registered workers who were covered by the Scheme of 1965 were required to be absorbed by the respondent No.1 as its employees and a settlement was signed to that effect on 4th February, 1998. However, a large number of workers from the Mini Pool were not given the

benefit of the settlement and, on the other hand, from first week of 1999 the registered employers started engaging private workers inspite of the clarification issued that MDLB or respondent No.1 had no such private workers were allowed to be engaged in the premises of respondent No.1. Being aggrieved by the refusal to absorb the Mini Pool workers as employees of respondent No.1 as well as the engagement of private workers by the Handling Agents, this petition was moved for the reliefs as stated hereinabove.

4. Affidavit-in-reply has been filed on behalf of the respondent No.1 as well as respondent No.2. Respondent No.4 Mormugao Stevedores Association has been impleaded by way of amendment. Respondents No.1 and 2 have opposed the petition. It is submitted by respondent No.1 that the Scheme of 1965 was not applicable to the Mini Pool workers as purportedly represented by the petitioner Union and they were not the registered dock workers within the meaning of the said Scheme. The Scheme was framed in exercise of the Act, and it ceased to be operational consequent to the Notification dated 17th March, 1998 in terms of Section 4(1)(c) of the Act of 1997. The condition precedent for being qualified for absorption in the employment of respondent No.1 was that the employee or worker should establish that he was working under Dock Labour Board immediately receding the appointed day and none of the Mini Pool workers were so working. Clause 23 of the Scheme of 1965 provides that each worker at the time of registration under the Scheme shall

pay a registration fee of Rs.2/- to the Board and clause 16(2) provides for the maintenance of registers, whereas clause 24 envisages that every worker shall be supplied free of charge:- (a) an identity card; (ii) an Attendance card and (iii) wage slips in the form prescribed by the Board. The names of the workers whom the petitioner Union claims to represent were not entered in the register of record nor were they paid at any time the registration fee or any cards were supplied to them. Unless such details were furnished, the claim of the Union that all the workers it represents from the Mini Pool were registered dock workers could not be accepted even prima facie. Reference has been made to the Order passed by this Court in Writ Petition No.340/1998 on 24.11.1998. A settlement came to be signed in February, 1998 in respect of the registered dock workers and it was arrived between the Dock Labour Board, its workmen and the Management of the Major Ports in accordance with the provisions of the Industrial Disputes Act. The petitioner Union had, at no time, represented or made any grievance that they were to participate in the proceedings in terms of Section 3 of 1997 Act and that they were not called upon to participate in the said proceedings. Reference has also been made to the letter dated 31st August, 1998 received by the Chairman of respondent No.1 from the Government of India to the effect that the policy of the Central Government did not favour decasualisation and as such it would not be possible for the Government to agree to the merger of any of the Mini Pool workers engaged through respondent No.2.

5. Reply affidavit of respondent No.2 shows that it has been dissolved with effect from 31.7.99 pursuant to the resolution passed in its General Body meeting held 26.7.99. It was not aware of the petitioner Union representing the workers from the Mini Pool and it got the knowledge for the first time through a communication dated 2.8.99. It does admit that the Mini Pool workers were being engaged through it for working on various jobs in the premises of respondent no.1. For some time there was sufficient workload available but subsequently it was drastically reduced from March, 1999 onwards. The unavailed/undisbursed earnings were about to the tune of Rs. 33 lakhs and about 476 workers did not avail the disbursement allowances. It has specifically denied its status as the administrative body appointed under Section 5 of the Dock Workers Act, 1948 and also its status as a registered employer within the meaning of clause 5 of the Scheme of 1965. On the other hand, it is contended that respondent no.4 was such registered employer and it was the administrative body as contemplated in the said Scheme of 1965.

6. Shri Sardessai, the learned counsel for the petitioner Union has in his elaborate arguments submitted before us that the Scheme of 1965 is binding and it regulated the terms of employment of the Mini Pool workers as contemplated under Sections 3 and 4 of the Act. The Mini Pool workers were working for respondent No.1 even prior to 1983-84 and the respondent No.2 or respondent No.4 for that

matter were the only Agents who were engaged in maintaining records and had nothing to do with the terms of employment including supervision and control over these workers. The workers were de facto employees of the respondent No.1 in terms of the Scheme of 1965 and therefore they were also required to be absorbed under the employment of respondent No.1 from the declared date i.e. 31.3.98. Inspite of several representations made by the Union, no heed was paid and therefore this petition was moved seeking a writ of mandamus or orders in the nature of mandamus for the reliefs as set out hereinabove.

7. Mr. Sardessai agreed that the decision in the case of **Visakhapatnam Dock Labour Board v. Stevedores' Association, Visakhapatnam, and others (**A.I.R**. 1970 S.C. 46)** has specifically held that the Board cannot be considered to be the employer of the Dock Labour workmen under the Scheme of 1965 and the registered employer to whom the labour force was alloted by the Board was the employer of those engaged in loading or unloading of ships. However, he submitted that this decision of the Two Judge Bench had not considered the earlier law laid down by a Four Judge Bench of the Apex Court in the case of **Dharangadhra Chemical Works Ltd. v. State of Saurashtra and others (1957 1 L.L.J. 477).** It was submitted by Mr. Sardessai that the position in law was more elaborately clarified by a three Judges Bench subsequently in the case of **Hussainbhai, Calicut v. The Alath Factory Thezhilali, Union,**

Kozhikode and others (A.I.R. 1978 S.C. 1410). The learned counsel has also relied upon a Division Bench decision of the Calcutta High Court in the case of **Calcutta Dock Labour Board v. The Payment of Wages Authority and others (1982 Lab.I.C. 657)** and a recent decision of the Apex Court in the case of **National Thermal Power Corporation Ltd. v. Karri Pothuraju & Ors. (JT 2003(7) SC 149)** in support of his contentions that the Scheme of 1965 flowed from the statutory provisions and the registered workers who were working for Respondent No.1 under the said Scheme of 1965 were in fact the employees of respondent No.1. The role of respondent No.2 or respondent No.4 for that matter was only of agents who were responsible to maintain certain records and nothing else.

8. Mr. Nadkarni, the learned Senior Counsel appearing for the respondent No.1 on the other hand has placed reliance on the decision sin the case sof **Steel Authority of India Ltd. And others v. National Union Waterfront Workers and others [(2001) 7 S.C.C. 1]**, **Bharat Heavy Electricals Ltd. v. State of U.P. and others [(2003) 6 S.C.C. 528] and Ram Singh and others v. Union Territory, Chandigarh and others [(2004) 1 S.C.C. 126].** In short the submissions of the respondents are that this petition filed under Art.226 of the Constitution involves disputed questions of fact regarding the status of the Mini Pool workers and in any case they are not covered by the Scheme of 1965 and therefore their claims are

required to be adjudicated by leading evidence before the Industrial Tribunal by way of reference under the Industrial Disputes Act , 1947 and the issue regarding their status cannot be gone into in a writ petition.

9. In **Dharangadhra Chemical Works Ltd. (supra)** after referring to a number of authorities, the Supreme Court evolved certain tests to determine the employer/employee relationship in the following terms:-

> " The principle which emerges from these authorities is that the prima facie test for determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work.
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> The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. "

It was concluded that the correct method of approach, therefore, would be to consider whether having regard to the nature

of the work there was due control and supervision by the employer and the question whether the relationship between the parties is one as between employer and employee or between master and servant is a pure question of fact.

10. In the case of **Hussainbhai (supra)** the same issue was concluded in the following words :-

> " Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact; the employer. He has economic control over the workers' subsistence, skill and continued employment. If he for any reason, chokes off, the worker is, virtually; laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex. Contractu is of consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different, perfect paper arrangement, tht the real employer is the Management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like may be resorted to when labour

> legislation casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 and 43-A of the Constitution. The court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the maya of legal appearances. “

In the case of **National Thermal Power Corporation Ltd. (supra)** the status of canteen workers employed in a factory governed by the provisions of Factories Act, 1948 was considered. The workers in the canteen had approached the High Court by filing a petition under Art.226 of the Constitution seeking for directions to the Corporation to regularize their services with attendant benefits. The employer had contested the petition and the learned Single Judge was pleased to dismiss the petition. However, the Division Bench allowed the petition and in appeal the Supreme Court after referring to its earlier decisions held that where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor, the Courts have held that the contract labour would indeed be the employees of the principal employer and therefore it upheld the view taken by the Division Bench.

11. Mr. Sardessai submitted that in the instant case the terms of employment of the Mini Pool workers were governed by the Scheme of 1965 framed under the Act and therefore the law laid down by the

Apex Court in the case of National Thermal Power Corporation (supra) was squarely applicable and hence the declaration as sought for was required to be made by this Court. He has also submitted a detail chart marked as Annexure 'X' for identification by us. Reference has been made to different clauses of the Scheme of 1965 so as to show that the recruitment/selection as well as deployment, attendance and payment of wages, supervision and control, disciplinary control leading to punishment, including dismissal were the areas where respondent No.1 and MDLB had the final say and, in fact, deep and pervasive involvement and without leaving anything to either respondent No.2 or respondent No.4. The agency of respondent No.2 or respondent No.4 was a camouflage and they had no say in regulating the terms of employment of the Mini Pool workers except to collect the amount of compensation and distribute to the workers.

12. The petitioner, after amendment of the petition, has clearly admitted that the workers, it represents, are known as “Mini Pool” workers registered with respondent No.2. This is clear from para 24-E of the Petition Memo and the averments in para 24-F and 24-G are required to be reproduced because they form the foundation of the petitioner's claim:-

> “ (24-F) Petitioner states that the records and registers of the said workers were maintained by

> respondent No.2. The second respondent also controlled their employment. Their grouping and re-grouping was done by respondent No.2. Their allocation to the individual registered employers was done by respondent no.2. The said respondent kept their attendance records, made payment of their wages, collected their contributions towards Provident Fund and other statutory contributions, made entries in their attendance cards and wage slips. They were paid guaranteed minimum wages as provided in the scheme. In effect, respondent no.2 carried out all functions of the Mormugao Dock Labour Board and its authorities in relation to the said workers as provided in the Mormugao Dock Workers (Regulation and Employment) Scheme, 1965.
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> (24-G) Petitioner states that respondent no.2 was formed by Mormugao Dock Labour Board. Respondent no.2 was formed for regulating the employment and conditions of service of casual dock workers. The second respondent was, therefore, the agent of Mormugao Dock Labour Board in so far as the said workers are concerned. “

13. In its reply the respondent No.2 has clearly set out its status as a charitable society which maintained the rotation of availability of piece-meal casual work to the Mini Pool workers and stated further thus: “The society was not the employer. Individual handling agents, affording piece-work occasioned from time to time , were defined to be the employers in terms of the certified Standing Orders. “

Thus the respondent No.2 disowns its liability as the

employer of the Mini Pool workers and very clearly states that the individual Handling Agents who were its members continued to be the employers. Notwithstanding these averments of respondent No.2, the moot question that requires consideration by us in this petition is whether the declarations sought for by the petitioner Union can be granted in a writ petition under Article 226 of the Constitution.

14. Writ Petition No.340/98 filed by the Mormugao Waterfront workers Union was summarily rejected by a Division Bench of this Court on 24th November, 1998. The present respondent No.1 was impleaded as respondent No.2 and respondent No.2 was impleaded as respondent No.3 in the said petition. The petitioner's main contention was that its members were Dock workers and under the Scheme of 1965 respondent No.3 was required to initiate action for merger with respondent No.2. The main relief was regarding recovery of wages which were unpaid and this Court noted that the remedy available under Section 33(C)(2) of the I.D. Act was not invoked at any time though the petitioner had approached the Assistant Labour Commissioner for conciliation. This Court held that the petition could not have been entertained and it was summarily rejected. This Order shows that the claim of the Mini Pool workers as raised in the instant petition was not under consideration in W.P. No.340/98. However, it is clear from the record that Reference CGIT-2/192 of 1999 has been made at the instance of the Waterfront

Workers Union which was the petitioner in W.P. No.340/98 and in the said Reference the present Union on its application has been impleaded. An application appears to have been made in the said Reference by the present Union which is impleaded as Party II for addition of Chairman, Mormugao Port Trust i.e. Present respondent No.1 and the said application has been rejected by the Presiding Officer on 10.9.2003. It appears that reference made is regarding recovery of unpaid salary of the Mini Pool workers engaged in the premises of present Respondent no.1. It does not appear that the reliefs sought for in the present petition are covered by the said Reference.

15. Clause 2(2) of the Scheme of 1965 states that the Scheme relates to the Port of Mormugao and applies to the classes or description of Dock work and Dock workers set out in Schedule I. Schedule I to the said Scheme relates to the classes or description of Dock work and Dock workers to which it applies. The following categories of Dock work and Dock workers are mentioned:- (a) Stevedores work and cargo handling from wharf to transit shed and vice versa; (b) the following category of Stevedores workers : I-Gang workers and II- Winch drivers. Thus the first disputed question before us is regarding the applicability of the 1965 Scheme to the Mini Pool workers. The second disputed question before us is the status of the Mini Pool workers as registered dock workers. The third disputed issue is the status of respondent No.2 as the

registered employer within the meaning of Scheme of 1965. Under such circumstances, the reliance of Mr. Sardessai on the case of National Thermal Power Corporation is misplaced.

At the same time, it may be possible for the petitioner to establish its relationship with respondent No.1 directly notwithstanding the Scheme of 1965 and by leading evidence – both oral and documentary, in support of its case that the respondent No.1 was in fact the employer of the workers from the Mini Pool and the respondent No.2 was only an artificial arrangement brought about in 1983-84. This issue cannot be examined in a writ petition under Art.226 of the Constitution. The petitioner will have to therefore seek a reference for adjudication under the Industrial Disputes Act, 1947 so as to prove its case that in respect of the Mini Pool workers it claims to represent the de facto employer was respondent No.1 either on the basis of the Scheme of 1965 or independent of the said Scheme - namely there was an employer and employee relationship with respondent No.1 and respondent No.2 or respondent No.4 or any of the members of respondent No.2 were only agencies maintaining the records, whereas the supervision and control as well as the recruitment, discipline, fixation of wage rates, etc. were entirely within the power of the respondent No.1 or the Board constituted under the Scheme. This exercise cannot be undertaken in a writ petition. Though the Secretary for Labour, Union of India was impleaded a respondent No.3, no return has been filed by the said

authority. The ends of justice would be met if the respondent No.3 treats this petition as a representation for conciliation of the petitioner's demand in terms of the declaration sought for in the petition and forwards the same to the Central Labour Commissioner concerned so as to consider the same for making reference under the Industrial Disputes Act, 1947. This petition has been pending before us right from 1999 and therefore such a represenation would not be hit by limitation or it could not be termed as belated. The law laid down by the Constitution Bench in the case of Steel Authority of India Ltd. (supra) and subsequently followed in the case of National Thermal Power Corporation (supra) as well as Ram Singh and Others (supra) mandates that the petitioner Union places its case for adjudication before the competent forum under the Industrial Disputes Act. The observations made by the Apex Court in Ram Singh's case in paras 15 and 16 clearly show that the issue regarding the relationship of employer and employee is a matter which requires to be adjudicated on the basis of documentary and oral evidence before an adjudicator under the Industrial Disputes Act.

16. In the premises we hold that the declarations as sought for in this petition cannot be made and the appropriate remedy for the petitioner Union would be to seek an adjudication of its claims and more particularly for a declaration that the Mini Pool workers were the employees of respondent No.1 all along. We, therefore, direct the respondent No.3 to forward a copy of this petition to the

concerned Labour Commissioner (Central Government) to treat the same as representation for the demands of the petitioner Union and consider the same for adjudication under the provisions of the Industrial Disputes Act, 1947. We hope that the Labour Commissioner concerned shall complete the conciliation proceedings within a time frame of about three months and record his decision within such a period of three months after the respondent No.3 has referred the issue to him.

17. Rule made absolute accordingly, with no order as to costs. Writ to go forthwith.

B. H. MARLAPALLE, J.

N. A. BRITTO, J.

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